

# THE DYNAMIC CONSTITUTION

An Introduction to American  
Constitutional Law

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## Introduction: The Dynamic Constitution

[O]ur Constitution . . . is an experiment, as all life is an experiment.  
– Justice Oliver Wendell Holmes, Jr.<sup>1</sup>

ALTHOUGH THE CONSTITUTION OF THE UNITED STATES is a single written document, American constitutional law – the subject of this book – is a complex social, cultural, and political practice that includes much more than the written Constitution. Courts, and especially the Supreme Court of the United States, interpret the Constitution. So do legislators and other governmental officials as they consider their responsibilities. Very commonly, however, “interpretation” of the Constitution depends on a variety of considerations external to the text. These include the historic practices of Congress and the President, previous judicial decisions or “precedents,” public expectations, practical considerations, and moral and political values. By talking about constitutional law as a “practice,” I mean to signal that factors such as these are elements of the process from which constitutional law emerges.<sup>2</sup>

To be sure, arguments about how to interpret the Constitution occur frequently in constitutional practice – not least among Justices of the Supreme Court. (Among the difficulties in studying constitutional law is that the rules of constitutional interpretation are nowhere written down in authoritative form.) Nonetheless, a few fixed points command nearly universal agreement. First, at the center of the frequently argumentative practice of constitutional law stands the written Constitution of the United States. Second, when the Supreme Court decides a case, it is almost universally supposed that its ruling binds public officials as well as citizens, despite their possibly contrary

views. Supreme Court rulings occasionally encounter resistance, and in a few rare cases they have provoked actual or threatened defiance – matters that I discuss later in this book. Normally, however, the Court gets to say authoritatively what the Constitution means.

In subsequent chapters, I plunge directly into discussions of how particular provisions of the Constitution have been interpreted, especially but not exclusively by the Supreme Court. This chapter explores the textual and historical foundations of our constitutional practice. It first sketches the history that led to the Constitution's adoption, then briefly describes the central provisions of the Constitution itself. Today, we tend to take it for granted that the Supreme Court will interpret and enforce the Constitution. But it was once contested whether the Court should play this role at all; and *how* the Court should play it, as we saw in the Prologue, is a subject of continuing controversy. As background to current debates, the final sections of this chapter therefore outline a bit more relevant history. I discuss the case in which the Supreme Court first claimed the power of judicial review, *Marbury v. Madison*<sup>3</sup> (1803), and then conclude with a brief survey of the Court's use of its power.

## History

At the time of the American Revolution, the fledgling nation seeking independence consisted of thirteen separate colonies. Brought together by their common opposition to the taxing policies of the British Parliament, the colonies began sending delegates to a Continental Congress in 1774. This arrangement was initially quite informal. Delegates were elected by the assemblies of their respective colonies. Meeting in Congress, they could vote requests that the various colonies raise troops or furnish funds, but the Congress itself possessed no direct authority to enforce its requests.

In 1777, before the Revolutionary War concluded, the Continental Congress moved to formalize the relationship among the colonies by proposing the Articles of Confederation, which were ratified by the assemblies of all thirteen states or colonies and took effect in



1781. Like the more informal scheme that had preceded them, the Articles established a confederation of equal states, each with one vote. The national government, such as it was, still had to look to the states to enforce its directives. If it wished to lay a tax, for example, it had to request the states to assess and collect it. The Articles carefully enumerated the purposes for which the states were united; any power not specifically given to the national Congress was denied to it. The Articles of Confederation did not create an independent executive branch, and there was almost no judicial system. For the Congress to act, nine states needed to concur in ordinary decisions. More fundamental actions required unanimous consent.

As swiftly became clear, the government created by the Articles of Confederation was too weak. Although fighting with Britain stopped in 1781, and a formal peace followed in 1783, the European powers continued to pose threats that could be met only by decisive, coordinated action. At home, an economic downturn revealed the need for a national economic policy including a uniform currency and safeguards against inflation and nonpayment of debts.

To deal with these and related problems, the Continental Congress asked the colonies (or states) to send delegates to a convention in the summer of 1787 to draft proposed amendments to the Articles of Confederation. When the Convention met in Philadelphia, however, the delegates decided almost immediately to ignore their mandate and to draft an entirely new Constitution. The Convention also determined to ignore the Articles of Confederation insofar as the Articles forbade major changes in the scheme of national government without the unanimous approval of the thirteen states voting in Congress. Article VII of the new, draft Constitution provided that it would take effect on ratification by nine states and further directed that the ratifications should be by “conventions” of the people of the states, not by the state legislatures.

The decision of the Constitutional Convention to ignore or defy the Articles of Confederation – which were, after all, the then-prevailing “law” – is at least interesting in its own right and probably possesses enduring significance for American constitutional law.<sup>4</sup> Were

the Constitution's authors (or framers as they are more commonly called) and ratifiers (or those who voted to approve it in separate state conventions) "outlaws" in their own time? Why were they not obliged to follow the Articles of Confederation in all of their written detail? How could valid law, in the form of a Constitution, emerge from actions not authorized by prior written law? It is not enough to say that the framers decided to start over; surely not every group is entitled to "start over" whenever it feels like doing so – for example, by staging a coup or pronouncing itself not bound by current constitutional law. In thinking that they were entitled to ignore the written law of their time, whereas others living under the new Constitution would be bound by it, the framers and ratifiers – followed by subsequent generations who have lionized them – appear to have assumed that unwritten principles of moral and political right preexist, and in some sense are more fundamental than, any written law. In light of the Constitution's origins, it should come as no surprise that debates about whether the Constitution presupposes background principles of moral and political right, even if it does not list them expressly, have echoed throughout American constitutional history.<sup>5</sup>

### Original Constitutional Design

By any reasonable measure, the delegates to the Constitutional Convention were an extraordinarily able group. They pursued their work with a mixture of idealism, imagination, practicality, and self-interest. As in the Continental Congress, each state had one vote in the Convention's deliberations. Predictably, the delegations disputed whether each state should retain one vote in the new government's legislative branch or whether representation should instead reflect population. The delegates ultimately agreed to a compromise: Representation in the House of Representatives depends on population, but each state, regardless of size, gets two Senators.<sup>6</sup>

Throughout the Convention's deliberations, the delegates took it for granted that slavery must continue to exist under the new Constitution. Otherwise the slave states would not have participated. In at least three places the Constitution makes veiled reference to

slavery but avoids the shameful term.<sup>7</sup> No women attended the Constitutional Convention. Not until after the Civil War could the Constitution even plausibly be viewed as a charter of equal human freedom.

From a modern perspective, it also bears note that there were no political parties at the Constitutional Convention. On the contrary, the framers disliked the very idea of parties, which they associated with “factions” hostile to the general or public interest. Nevertheless, a party system quickly grew up. For the most part, the parties have worked within a constitutional structure not designed for them.<sup>8</sup>

Although much of the framers’ specific thinking now seems embedded in a worldview that is difficult to retrieve, on other issues their aspirations seem timeless. At the highest level of abstraction, they wanted to create a national government that was strong enough to deal effectively with genuinely national problems but would not threaten the liberties of a free people (on the uncomfortable assumption that slaves did not count). In pursuing these aims, the basic structure created by the Constitution has impressed most Americans as adequate, and even admirable, for more than 200 years.

Apart from a brief Preamble, the Constitution – which is reprinted as an appendix to this book for readers who may want to consult it – is not a rhetorical document. Working from the ground up, it literally constitutes the government of the United States. The main structural work occurs in the first three Articles.

Article I provides that “[a]ll legislative powers . . . shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” Following sections that deal with qualifications, apportionment, and election, Article I, Section 8 lists the powers of Congress in a series of seventeen clauses that include the “Power to lay and collect Taxes” and to “regulate Commerce.” The list concludes with the so-called “Necessary and Proper Clause,” authorizing Congress “to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States.” The Necessary and Proper Clause has been read as mandating a broad interpretation of Congress’s other powers.

Article II vests the executive power in a President of the United States. It provides for the election of the President and Vice President, then specifies the President's powers and duties in a reasonably detailed list. Among other things, the President is made the Commander-in-Chief of the armed forces and is empowered to make treaties and to appoint ambassadors, judges, and other officers of the United States "by and with the Advice and Consent of the Senate." The President also possesses a power to veto or reject legislation enacted by Congress, subject to override by two-thirds majorities of both Houses.

Article III vests "the judicial Power of the United States" in "one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Both in the Constitutional Convention and in the ratification debates, it appears to have been taken for granted that the courts, and especially the Supreme Court, would determine whether legislation enacted by Congress and the states comports with the Constitution.<sup>9</sup> But the text of Article III leaves the power of "judicial review," as it is called, implicit rather than explicit.

Article IV contains miscellaneous provisions. The so-called "Privileges and Immunities Clause" imposes an antidiscrimination rule: It limits the freedom of states to discriminate against citizens of other states who might travel or pursue business opportunities within their borders. Another clause of Article IV provides for the admission of new states. A third empowers Congress to legislate for the territories.

Article V establishes the process for amending the Constitution. Unlike ordinary laws, constitutional amendments require the concurrence of two-thirds of both Houses of Congress and of three-fourths of the states.

Article VI states explicitly that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land." This so-called Supremacy Clause establishes that whenever state law conflicts with either the Constitution or with federal laws passed by Congress, state law must yield. Article VI also forbids the use of any religious test "as a Qualification to any Office or public Trust under the United States." Article

VII provides for the Constitution to be ratified by conventions in the several states, not by the state legislatures.

As originally written, the Constitution included only a few express guarantees of rights. To safeguard liberty, the framers relied principally on the strategy of making the federal government one of limited or “enumerated” powers. They saw no need to create an express right to freedom of speech, for example, because they thought that the delegated powers of Congress, properly construed, included no authority to enact legislation encroaching on speech rights.

During the debates about whether the Constitution should be ratified, however, the absence of a bill of rights was widely criticized, and the Constitution’s main champions – the so-called Federalists – promised to remedy the perceived defect. After the Constitution’s ratification, the first Congress proposed twelve amendments, ten of which were quickly approved and took effect in 1791. Known collectively as the Bill of Rights, these ten amendments are today regarded as mainstays of constitutional freedom. The First Amendment guarantees freedoms of speech and religion. The Second provides that “[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” The Third Amendment forbids the quartering of troops in private homes without the owners’ consent, except in time of war. The Fourth Amendment creates rights against “unreasonable” searches and seizures. The Fifth Amendment forbids deprivations of “life, liberty, or property, without due process of law.” Along with the Sixth Amendment, it also provides a variety of rights to people accused of crimes. The Seventh Amendment protects rights to trial by jury. The Eighth bars “cruel and unusual punishments.” The Ninth says that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” Finally, the Tenth Amendment emphasizes the continuingly important role of the states (the powers of which come from their own constitutions and not, interestingly and importantly, from the Constitution of the United States): “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

Strikingly to modern eyes, the Bill of Rights originally applied only to the federal government and imposed no restrictions on the states.<sup>10</sup> In other words, it left the states free to regulate speech and religion, for example. In the context of the times, national governmental power obviously aroused more distrust than state power. But trust of the states soon eroded, especially in the long struggle over slavery that increasingly dominated American politics in the first part of the nineteenth century.

That struggle ultimately produced the Civil War, which in turn led to adoption of the Thirteenth Amendment abolishing slavery, the Fourteenth Amendment requiring the states to accord to every person “the equal protection of the laws,” and the Fifteenth Amendment forbidding race-based discrimination in voting. Beginning in the twentieth century, the Supreme Court has also construed the Fourteenth Amendment as making nearly all guarantees of the Bill of Rights applicable against the states – a development specifically discussed in Chapter Five. This is a phenomenon of enormous importance, which marks a sharp divide in constitutional history. Since the “Civil War Amendments,” twelve further amendments have been ratified, for a total of twenty-seven. Among the most important, the Sixteenth Amendment authorizes Congress to impose an income tax, the Nineteenth guarantees voting rights to women, and the Twenty-Second bars a President from serving more than two terms in office.

One further feature of the Constitution’s design deserves emphasis. As is discussed in greater detail in Chapter Fourteen, virtually without exception the Constitution applies only to the government, not to private citizens or companies. Accordingly, if a private company fires an employee for criticizing the boss, it does not violate the constitutional right to freedom of speech – which is only a right against the government. So it also is with other constitutional provisions, including the Equal Protection Clause of the Fourteenth Amendment, which generally prohibits race-based and certain other kinds of discrimination by the government. If private citizens discriminate on the basis of race, they may be acting wrongly as a moral matter and may also violate laws enacted by Congress or state or local governments, but they do not violate the Constitution.

## The Constitution as Higher Law: Foundations of Judicial Review

Although many changes have occurred subsequently, the ratification of the Constitution, as supplemented by the Bill of Rights, created the basic framework of federal law that persists today. On one level there is ordinary law, enacted by ordinary majorities in Congress, state legislatures, and local governments. On another level stands the Constitution, as higher law, which not only establishes and empowers the national government, but also imposes limits on what ordinary law can do.

The status of the Constitution as higher *law* is crucial to the role played by courts, and especially the Supreme Court, in the American scheme of government. In nonconstitutional cases, such as those involving questions about whether people have committed crimes or broken contracts, courts routinely interpret and enforce the law. Given the status of the Constitution as higher law, most Americans living today probably take it for granted that courts should interpret and enforce the Constitution as well. In fact, to allow the Supreme Court to interpret the Constitution, and to treat other branches of government as bound by the Court's decisions, was a choice. It was certainly not an inevitable choice in 1787, when the Constitution was written. Indeed, critics have sometimes questioned whether the Constitution authorizes courts to rule on the constitutionality of legislation at all.

Nowhere does the Constitution say expressly that the courts should have the power to review the constitutionality of legislation. Nor is "judicial review" by any means a logical necessity. In Britain, the source of many American legal principles, the courts traditionally had no role in testing the validity of legislation. The rule was "parliamentary sovereignty": Any legislation enacted by Parliament and approved by the monarch was law. To be sure, Britain did not have a written constitution. Even under a written constitution, however, it would be possible to take the same approach. It could have been left to Congress to judge the constitutionality of legislation, and the courts would simply have enforced the law as passed by Congress.

Despite the possibility of constitutionalism without judicial review, and despite the absence of any express reference in the constitutional text, the power of the courts to determine the constitutionality of legislation can fairly be viewed as implicit in Article III, which deals with the judicial power. Article III calls for the federal courts to decide cases “arising under this Constitution” – language best understood as referring to cases in which questions of constitutional law are presented for decision. In addition, Article VI says that state judges are bound by the Constitution, “any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” Again, this language implies that state judges must assess the constitutional validity of state laws. If the power of judicial review is given to state judges, then surely it must exist in the Supreme Court, which the Constitution empowers to hear appeals from state court judgments.

Historical evidence supports this conclusion. Several discussions at the Constitutional Convention anticipated that the courts would exercise judicial review.<sup>11</sup> During the ratification debates, Alexander Hamilton plainly stated in one of the Federalist Papers that the Constitution assigned this role to the judiciary.<sup>12</sup> Indeed, several early decisions of the Supreme Court assumed the power of judicial review without anyone paying much attention.<sup>13</sup>

### *Marbury v. Madison: An Enduring Symbol of Judicial Power*

In the early years, however, much was in flux. Government under a written constitution, enforced by an independent judiciary, was a novelty in the history of nations. Many elements of the experiment were precarious, as became plain when a crisis developed in the aftermath of the 1800 presidential election. Although the framers of the Constitution did not envision the rise of political parties, partisan divisions quickly emerged, and the election of 1800 was bitterly fought between the Federalists supporting John Adams and the Republicans backing Thomas Jefferson. The Federalists, who had dominated the national government during the presidential administrations of George Washington and his successor Adams, generally supported broad national authority, a sound currency, and domestic



and foreign policies promoting commercial interests. By contrast, the Republicans were the party of states' rights and political and economic democracy.

After the Republicans won a stunning triumph at the polls, the outgoing Federalists remained in office for a brief period before the inauguration of the new administration. In that interlude, they sought means to safeguard their party and the nation against the anticipated reckless adventures of Jefferson's Republicans. Lacking other plausible options, they decided to rely on the courts. In the brief period between the election and Jefferson's inauguration, the outgoing Federalists hatched and swiftly implemented a plan to preserve Federalist values through the federal judiciary.<sup>14</sup> First, President Adams named his Secretary of State, John Marshall, as the new Chief Justice of the United States. The Senate then swiftly confirmed him. Second, Congress created sixteen new federal judgeships, to which Adams nominated and the Senate quickly confirmed sixteen new "midnight judges," all Federalists. Finally, in a much less significant move, the outgoing Federalist Congress authorized the President to appoint forty-two minor office-holders, called justices of the peace, for the District of Columbia. In the confusion of the Adams administration's last days, several of these commissions failed to be delivered. When William Marbury did not get his, he filed a suit in the Supreme Court, asking it to order the Secretary of State of the new Jefferson administration, James Madison, to deliver his commission.

Understandably under the circumstances, Jefferson's Republicans took office in a state of fury about the lame-duck Federalists' efforts to commandeer the federal judiciary. Without compunction, the Republicans set out to stop the Federalists from retaining through the courts the influence that they had lost at the polls. On one front, the Republican Congress abolished the new federal judgeships that its predecessor had created. On another, after William Marbury filed his suit in the Supreme Court in December of 1801, Congress enacted legislation that effectively barred the Court from meeting for more than a year, until February 1803. On a third, the Jeffersonians set out to "impeach" and remove from office Federalist judges that they believed had abused their powers.<sup>15</sup>

When William Marbury's suit against James Madison came before the Supreme Court in this bitter climate, the Court stood at a crossroads with disaster threatening on both sides. *Marbury v. Madison* had plain overtones of Federalists versus Republicans. If the Court ruled for the Federalist Marbury and ordered Madison to deliver his commission, it was widely expected that Madison – acting at the direction of President Jefferson – would defy the Court's order. Jefferson and Madison could surely have gotten away with defiance in the political climate of the day, and it is even likely that Marshall might have been impeached if he had ruled against the popular new administration, which had solid congressional majorities behind it. Had events developed in this way, the Supreme Court would have been diminished. If, however, the Court simply ruled against Marbury and in favor of Madison, the precedent of bowing before political threats, or even of appearing to do so, might have boded equally badly for the constitutional ideal of an independent judiciary.

With remarkable ingenuity, Marshall found a way to establish *Marbury v. Madison*<sup>16</sup> as an enduring symbol of judicial power, not impotence. He did so by focusing on a technicality, involving what lawyers call “jurisdiction” or the authority of a particular court to decide a particular case. In plain terms, Marbury had sued in the wrong court. By constitutional design, the Supreme Court functions almost exclusively as an “appellate” court, reviewing decisions already made by lower courts to correct errors on points of law. In only a few categories of cases will the Constitution allow someone to sue directly in the Supreme Court without going to a lower court first. Marbury's suit against Madison did not fall within any of those exceptional categories. As a result, the Supreme Court had no “jurisdiction” to rule on Marbury's suit against Madison. Although this is the conclusion to which John Marshall's opinion ultimately came, he got there by a very circuitous route, which required him to make broad rulings on the Supreme Court's power.

Marshall began his opinion by holding that William Marbury had a right to his commission. He held next that for every right the laws of the United States must furnish a remedy – including, if necessary, the remedy of a judicial order commanding action by high governmental

officials such as the Secretary of State. This was an enormous claim of judicial power, which Jefferson and Madison would have denied and indeed defied if the occasion had arisen. But that occasion had not yet arrived, and within the structure of Marshall's opinion it never would, because the Chief Justice had still not reached the jurisdictional question of the Supreme Court's authority to rule on the case at all.

When Marshall finally addressed that question, he might have treated the answer as obvious: Under the Constitution, the Supreme Court is mostly supposed to hear appeals, not to act as a trial court in cases such as *Marbury*'s. Instead, Marshall pointed to a statute authorizing the Supreme Court to issue the kind of *remedy* that *Marbury* sought, a "writ of mandamus" ordering government officials to perform their legal duties. By enacting that statute, Marshall's opinion reasoned, Congress had attempted to give the Supreme Court jurisdiction to act as a trial court in every case in which one party sought a writ of mandamus. In the view of most commentators, this was a clear misreading of the statute. Read in context, it authorized the Court to grant the remedy of mandamus only in cases that it otherwise had jurisdiction to decide.<sup>17</sup> By twisting the statutory language, however, Marshall managed to create a constitutional question about the power of the Supreme Court to engage in judicial review: A congressionally enacted statute directed the Court to act as a trial court in all cases involving claims to writs of mandamus, but the Constitution will permit the Court to exercise original or trial jurisdiction in only a narrower category of cases. So when a statute conflicts with the Constitution, by ordering what the Constitution forbids, which should a court follow, the statute or the Constitution?

With the question framed in this way, Marshall answered it easily, by giving the ruling for which *Marbury* is famous: It would defeat the purposes of a written Constitution if the courts had to enforce unconstitutional statutes. The courts must exercise judicial review because the Constitution is law, and it is the essence of the judicial function "to say what the law is."

With this conclusion, *Marbury* lost his case. The Supreme Court could not order Madison to give *Marbury* his commission as a

justice of the peace because it had no jurisdiction to do so. The fact that *Marbury* lost and Madison won solved Marshall's immediate problem, involving the specter of the President and Secretary of State defying a Supreme Court ruling and being applauded by Congress for doing so. But the chain of reasoning that led to the case's outcome involved assertions of enormous judicial power. Madison won, and *Marbury* lost, only as a result of a precedent-setting ruling that the Supreme Court must review the constitutionality of acts of Congress. *Marbury's* holding on this point has endured, and has generally been honored, into the present day.

### Politics and Judicial Review

Today, many lawyers regard *Marbury* as perhaps the most important case ever decided by the Supreme Court, because it was the first clearly to establish the power of judicial review. If *Marbury* is the foundation stone of judicial review, however, its status as such is partly ironic. The irony emerges from Marshall's reasoning about the purposes of a written Constitution and about the necessity of judicial review to promote them. As Marshall recognized, the Constitution aims to remove some questions from the domain of political decision-making. Without the guarantees of a written constitution, it would be open to Congress and ultimately to political majorities to decide whether to permit or deny freedom of religion, for example, and to determine whether the Supreme Court could exercise original jurisdiction in cases such as William Marbury's.

But it is one thing to say that the Constitution aims to remove certain questions from politics, another to determine which branch of government should interpret the Constitution. In suggesting that a written Constitution would be a nullity without judicial review, Marshall manifested a plain distrust of Congress and other political actors: He assumed that they could not be trusted to interpret the Constitution and the limits that it places on their power. This view is compelling, so far as it goes. Strikingly, however, Marshall stopped short of asking any searching questions about the possibility that politics, of one or another kind, might influence the exercise of judicial